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March 15, 2005

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

Part of
Public Record



Re: *Railroad Ventures, Inc. -- Abandonment Exemption Between Youngstown, Ohio
And Darlington, PA in Mahoning and Columbiana Counties, Ohio and
Beaver County, PA -- STB Docket No. AB-556 (Sub No. 2X)*

Dear Secretary Williams:

Enclosed for filing are an original and 10 copies of a "Joint Motion To Leave To File A Reply To Clarify The Record, Or, In The Alternative, Joint Motion To Strike" in the above-referenced case. Copies have been served as stated in the Certificate of Service.

Two copies of the above-mentioned document are enclosed, which we request be date stamped and returned to the undersigned. Thank you for your assistance in this matter.

Very truly yours,

Richard H. Streeter

Enclosures

Indianapolis

Fort Wayne

South Bend

Elkhart

Chicago

Washington, D.C.

213560

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-556 (Sub-No. 2X)

RAILROAD VENTURES, INC.
– ABANDONMENT EXEMPTION –
BETWEEN YOUNGSTOWN, OH, AND DARLINGTON, PA,
IN MAHONING AND COLUMBIANA COUNTIES, OH,
AND BEAVER COUNTY PA

JOINT MOTION FOR LEAVE TO FILE A REPLY TO A REPLY
TO CLARIFY THE RECORD, OR, IN THE ALTERNATIVE,
JOINT MOTION TO STRIKE

Come now Columbiana County Port Authority (“CCPA”) and Central Columbiana & Pennsylvania Railway, Inc. (“CCPR”), by and through counsel of record, and file their “Joint Motion For Leave to File a Reply to a Reply to Clarify the Record, or, in the Alternative, Joint Motion to Strike.” In particular, CCPA/CCPR seek to address and correct certain libelous statements and egregious errors by which Railroad Ventures, Inc. (“RVI”) has attempted to paint a grossly distorted picture of the evidence of record. In particular, *see* Verified Statement of George D. Wehner, ASA, at pp. 8 and 9 (“V.S. Wehner”).

CCPA/CCPR also wish to respond to RVI’s contention that, in order for administrative overhead to be assessed against repairs funded by State and Federal grants between January 2001 and August 2002, it was CCPA/CCPR’s burden to affirmatively demonstrate that such repairs were related to RVI’s failure to maintain the line and keep it operational during its period of ownership. RVI’s position disregards the law of the case and the Board’s original intent. If it were to be accepted by the Board, RVI’s position would retroactively eliminate the Board’s explicit condition that an expenditure from the escrow account could only be challenged if fraud

could be shown by RVI. Equally important, it would retroactively shift the burden of proof to CCPA/CCPR to demonstrate that a repair was attributable to RVI's action or inaction, and not to a prior owner of the line.

Without question, had CCPA/CCPR realized that they would be subjected to such retroactive manipulation, they would have declined to make any repairs until such time that a mechanism or procedure was in place that would allow RVI prospectively to challenge a particular repair on the grounds that it was not its responsibility. In the absence of any probative evidence presented by RVI that demonstrates that any particular repair project paid for with Federal or State funds was not related to its failure to keep the line operational, it is unconscionable to not allow CCPA/CCPR to assess administrative overhead against the escrow funds for necessary repairs that were made in order to restore service, but had to be paid for by Federal and State grants because RVI prevented the timely use of escrowed funds.

REQUEST FOR LEAVE TO FILE A REPLY TO A REPLY

Mindful of the Board's rules against filing a reply to a reply, CCPA/CCPR hereby request leave to file a reply to a reply in order to clarify the record and effect justice. As the Board recently observed in its decision in *Keokuk Junction Railway Company--Feeder Line Acquisition -- Line of Toledo, Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, STB Finance Docket No 34335 (served Feb. 7, 2005):

our rules are to be construed liberally to effect justice, 49 CFR 1100.3, and in several cases we have accepted replies to replies where it was appropriate to do so. *See, e.g., SMS Rail Service, Inc.-Petition for Declaratory Order*, STB Finance Docket 34483, slip op. at 3 (STB served Jan. 24, 2005).

The Board's reasoning is consistent with the Supreme Court's holding in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 533, 539, 90 S. C. 1285, 1292 (1970), that "{i}t is always within the discretion of a court or administrative agency to relax or modify its procedural rules

adopted for the orderly transaction of business before it when in a given case the ends of justice require it.”

Given the substantial adverse impact that the Board’s decision in this proceeding would have on the taxpayers of Ohio, as well as the unjust enrichment that would be awarded RVI if the Board’s *December 2004 Decision* is not reopened and reversed, it is in the public interest to compile a complete record that is not tainted by demonstrably false statements and misleading speculation. The ends of justice require no less.¹

In addition, the Board is also asked to reject RVI’s demand that the Board not consider the evidence contained in CCPA/CCPR’s supplemental filing of January 4, 2005.² Plainly, RVI should not be prejudiced by the Board’s acceptance of the data that were assembled by CCPR personnel over the Christmas holidays and forwarded overnight delivery to counsel on December 30, 2004, but not delivered until January 3, 2005.³ The one-day delay has not adversely impacted RVI, which was subsequently granted an extension until February 28, 2005 to respond. Because there is no good reason for the Board to decline to consider the supplemental evidence that was filed on January 4, 2005, it should exercise its recognized discretion to effect justice.

CLARIFICATIONS

I. The Verified Statement of George D. Wehner contains numerous factual errors and unfounded, libelous speculation.

Before turning to the factual errors in his statement, it should be noted that Wehner lacks

¹ Should the Board decline to accept this reply, it should nevertheless strike and disregard the portions of Wehner’s that are addressed herein.

² RVI Reply at p. 7.

³ As previously noted in CCPA/CCPR’s Motion to Supplement, because UPS failed to make delivery on December 31, as requested, counsel was unable to include the data, which consists of backup documentation for the extensive repair work that was undertaken by CCPR over the former RVI line, with the remainder of the Petition for Reopening and Reconsideration that was timely filed with the Board on January 3, 2005. It is also noted that RVI is simply in error when it suggests (RVI Reply at 7) that the Petition for Reopening and Reconsideration was not timely filed because it was not received in the Office of Proceedings until January 4, 2005.

any demonstrated qualifications to hold himself out as an expert with regard to an audit of financial statements and records. As his curriculum vitae proves, he is not a Certified Public Accountant. Rather, his background has involved “appraisals of machinery, equipment and fixtures for industrial and commercial properties ... and railroad fixtures.” In addition, he has worked as a rail inspector. There is no indication that he has any experience as a bookkeeper for a business of any size.

Even if it were to be assumed that he has some accounting background, any claim of expertise is negated by the series of egregious errors that appear in the portion of his statement in which he purports to provide the Board with an audit of CCPR’s General Ledger Detail Report (“LDR”). The LDR, which “detail[s] postings for periods 01 thru 10 ending 10/31/01” was submitted by CCPR as an attachment to the Verified Statement of Timothy Robbins filed January 4, 2005 and documents the expenditures made by CCPR when making the repairs necessitated by RVI’s failure to keep the line operational during its ownership of the line.

A. Page 8 of the Wehner statement is riddled with careless and/or deliberate errors:

The following errors are confirmed in the Verified Statement of Winfred L. Rose, who is a Certified Public Accountant.⁴ Wehner says that on page 14 of the LDR there is an entry for “Danny Robbins personal Visa in the amount of \$10,000.” The actual entry is only **\$252.00**.

Wehner says that on pages 15 and 16 of the LDR “there are entries to Delta Dental of over \$13,000.” The eight (8) entries on those pages for Delta Dental insurance total only **\$768.54**.

In addition to such clear errors, Wehner also leaves out crucial details or else tries to place a speculative spin on the data that does not survive careful scrutiny. For example, Wehner

⁴ For confirmation, see V.S. Rose at ¶¶ 3-6.

says that there is an entry on page 14 of the LDR for "Ricky Vaughn meal expense \$400." The entry actually reflects meals and lodging for multiple days.

Wehner also says that there is an entry on page 28 of the LDR for "meal expenses charged to Visa card totaling \$5,544." This entry covers nine (9) months of meals between January and October 2001 when the track was being rehabilitated in order to begin rail service. Before renting the apartment in Ohio, this entry would have included meals for Timothy and Daniel Robbins and for a three-man crew based in Arkansas that worked on the rehabilitation project in Ohio. Starting in June, monthly charges ranged only from \$156 to \$287 per month. The original submission to the Board only included \$4,903 for the period from 3/01/2001 through 12/31/2001. *See Summary of Repair Costs, Tab 23.*

Wehner says on page 30 of the LDR that "there is telephone expenses of \$8,431, a portion of which was paid to SunCom a southeastern wireless telephone company." This figure covers ten months of phone service for both land lines and cell phones. Apparently, Wehner is not aware that SunCom was a trade name used for a time by AT&T Wireless. Also, there is nothing to suggest that the telephone charges were excessive. These charges were not included in the original submission to the Board for administrative overhead. *See Summary of Repair Costs, Tab 23.*

Wehner also says that on page 32 of the LDR "there are \$8,885 in rents to Columbia Manor Apartments and Rent Way." Actually, the total rent for nine months was only \$7,934.18 (Wehner failed to note the credit that was given for one month's rent). Wehner also fails to mention that this figure includes both the monthly rental for the unfurnished apartment that was shared by Tim and Daniel Robbins between April and November 2001, as well as the furniture that was rented so that they did not have to sleep on the floor. Although Wehner seeks to leave

the impression that these “expenses appear to be inflated,” he offers no explanation for his comment. Because the average cost for the apartment was only \$17.16 per day, or \$8.58 per person, it is absurd to suggest that the rental expenses were inflated. The figures on page 32 of the LDR did not include the entire year’s expenses, which actually totaled \$9,837 as previously reported to the Board. *See* Summary of Repair Costs, Tab 23.

B. Page 9 of the Wehner statement is libelous as well as erroneous.

Wehner claims that there are “115 ledger entries to correct posting errors.” This comment reveals Wehner’s total lack of expertise. This contention is squarely rebutted by Winfred L. Rose, CPA. As Rose has explained:

Wehner states in the first paragraph at Line (1) that “115 ledger entries to correct posting errors on 34 pages, as many as 16 corrections on the same page.” I assume that this statement is intended to support his conclusion in the last sentence of the paragraph regarding the company’s alleged inadequate accounting procedures and sloppy bookkeeping. That conclusion is not justified. In my 32 years of public practice, I have never seen a set of books that did not contain corrections of posting errors. If you assume that his count is correct, there are an average of 11.5 correcting entries per month, which is no indication of anything, except the effort of the bookkeeping staff and management to record transactions properly.⁵

Wehner also says that bank fees, which were assessed 40 times over eight months, “were even amounts that one might speculate to be ‘NSF’ fees.”⁶ Such speculation is libelous and should not be tolerated by the Board in this or any other proceeding. Again, Wehner is ignorant of the facts. As Rose has also explained:

Wehner’s speculative comments regarding bank fees are unfounded. Disregarding speculation, during this period there were numerous bank fees because the company maintained four bank accounts and each bank account was assessed a regular and continuing service charge of \$10 per month. Such service charges

⁵ V.S. Rose at ¶ 7.

⁶ V.S. Wehner at p. 9.

had nothing to do with assessments for “NSF” fees.⁷
Wehner further errs when he claims that these entries total \$710.66. The actual total is \$510.66.

Wehner also claims that he discovered “ledger entries indicating that checks were written before deposits were made to make the checks good.” Here again, Wehner displays his lack of knowledge with regard to the facts. As Rose explains (*id.* at ¶ 10):

Wehner’s suggestion that checks were written before deposits were made is also wide of the mark. I have consulted with company’s accountant regarding the company’s check issuance policy and the timing of any required deposits necessary to “cover” the disbursements, now and in 2001. As I was informed, the policy has not changed. Because the parent company maintains multiple bank accounts in different banks because of the diverse locations of the affiliates, it is not unusual for the company to generate checks before funds are transferred to the particular account on which the check is drawn. However, it is the company’s policy to “hold” and not release the checks until the transfers have been accomplished. In addition, the computer generation of a check will be recorded in the in general ledger at date of generation; however, that general ledger date is not an indication of when the check was mailed or released and should not be construed an “NSF check”. I have found no evidence to support Mr. Wehner’s statement that there were “ledger entries indicating that checks were written before deposits were made to make the checks good.” Once again, the company’s independent auditors would have been very concerned about these types of transactions – had they existed.

Finally, Wehner is guilty of libelous speculation or commercial disparagement when he concludes with the baseless accusation that “[t]hese entries indicate serious cash flow problems, inadequate accounting procedures, and sloppy bookkeeping.”⁸ Once again, the Board should not tolerate such intemperate and baseless speculation, but should reject Wehner’s comments as reflecting either a lack of knowledge or lack of integrity, or both.

Wehner’s comments at pages 9-10 with regard to the Time Roll Reports is meaningless due to the lack of detail. Moreover, his arguments disregard the Board’s clear finding that work,

⁷ V.S. Rose at ¶ 9.

⁸ V.S. Wehner at p. 9.

such as brush cutting, was properly charged against the escrow account. The Board is also asked to note that all time reports involving repairs that were paid by grants from ORDC were certified and accepted by ORDC prior to release of payment.

II. Because There Is No Evidence Of Record That Any Administrative Overhead Expenses Were Related To “Other Rehab Work” Rather Than To Rehab Projects Related To RVI’s Ownership Of The Line, There Is No Legitimate Basis To Disqualify Payment Of 2001 Overhead Expenses From The Escrow Fund.

In opposing CCPR’s overhead, RVI insists that CCPA/CCPR “made no attempt to allocate their 2001 overhead expenses between rehab projects related to RVI ownership and all other rehab work.”⁹ This argument necessarily assumes, *without providing any probative evidence in support thereof*, that CCPR engaged in “other rehab work.” Simply stated, there is nothing of record that remotely suggests that CCPA engaged in any rehab work in 2001 that was not directly related to restoring the line to active rail service. If it is aware of any such “other rehab work,” RVI should be compelled to produce demonstrable evidence of such work. The bottom line, however, is that the record conclusively demonstrates that RVI has failed to show that any funds were drawn from the escrow account that were not related to the process of cleaning up the mess that RVI created when it allowed the line to disintegrate to the point that it could no longer be operated.

That RVI has not been able to show that CCPR engaged in any “other rehab work” speaks for itself. In the absence of probative evidence to show conclusively that CCPR was engaged in “other rehab work”, the Board, consistent with its past conclusion that “we hold RVI responsible [for allowing] sections of the track to become unserviceable,” should find that, because the line was fully operational when it was acquired by RVI from its prior owner, a presumption necessarily arises that repairs that were made to resume rail service over the line

⁹ RVI Reply at p. 19.

were related to RVI's period of ownership.¹⁰

RVI also insists that when CCPR made repairs to the rail line that were paid for with Federal or State grants, it was somehow engaged in making repairs that were not eligible for payment from the escrow account. Once again, RVI's position is wholly unsubstantiated.

Although RVI's argument appears to be based on the Board's remark that "there is not sufficient evidence that RVI was responsible for all the damage or deterioration for which those grants were used,"¹¹ there is no evidence that any repair paid for with grant money, including capital expenditures, was not related to RVI's well-documented disregard for its common carrier obligation. Because there is no avoiding the fact that the line was fully operational prior to RVI's assumption of ownership, the burden must be placed solely on RVI to demonstrate that it should not be held responsible for any repair made by CCPR, whether or not it was paid for by Federal or State grants. As a practical matter, CCPR was faced with a series of repairs that had to be made to the line in order to commence rail operations. Because CCPR knew, through Walter Gane who had previously worked on the line, that the line was operational prior to its sale to RVI, CCPR could reasonably assume that any and all of the required repairs were attributed to modifications of the track that had been authorized by RVI or to "a simple lack of due diligence [on RVI's part that caused] sections of the track to become unserviceable" for which RVI was responsible.¹²

As the Board explicitly stated at note 11 in its *November 2001* Decision (emphasis added):

RVI should not have allowed any portion of the track to become unserviceable through the actions of third parties, much

¹⁰ *November 2001 Decision* at n.11.

¹¹ *December 2004 Decision* at p. 13.

¹² *November 2001 Decision* at n.11.

less have invited those responsible for road repairs to pave over any portion of its tracks. Accordingly, **it does not matter whether RVI authorized the modifications to the right-of-way or whether a simple lack of due diligence was the cause for sections of the track to become unserviceable; we hold RVI responsible.**

The foregoing highlights the Board's general statements concerning "the kind of repairs intended to be covered by the escrowed funds." *Id.* at 6. It should also be remembered that the Board expressly rejected RVI's suggestion that the Board "did not mean for these funds to be used for capital expenditures or for any purpose other than removing asphalt or reconnecting signals."¹³ Instead, the Board specifically stated (emphasis added) that:

Our purpose in establishing the escrow account was broader, however. We meant for the escrowed proceeds to be used to correct egregious misconduct, whether by RVI actively (by inviting road crews to pave over track) or passively (by failing to protect the property from others rendering the line unserviceable by paving over, removing, or destroying track or disconnecting signals).^{*} Contrary to RVI's allegations, expenditures necessitated by RVI's disregard for the common carrier obligation cannot be considered as capital expenditures, but rather as necessary repair expenses to restore the line to service and **should be covered from the escrowed funds.**¹⁴

Because CCPR would have had no means of determining whether a particular repair was not attributable to the lack of due diligence, the burden was necessarily placed on RVI, not CCPR, to prove that any particular repair made during the period between January 21, 2001 and August 8, 2002 would not qualify for payment from the escrow account. However, even though RVI has not identified any cost of a repair that was not necessitated by RVI's action or inaction, the Board's *December 2004 Decision* retroactively placed the burden on CCPR.¹⁵

¹³ *November 2001 Decision* at p. 6.

¹⁴ *Id.* at p. 6-7 (emphasis added)(*note 11 set forth above).

¹⁵ This includes the repairs at the Norfolk Southern overpass which are discussed below.

Given the Board's determination (*id.* at 8) that "we will deny as moot CCPA's requests for ... an order establishing procedures for RVI to challenge whether certain repairs may be paid from the escrowed funds," it would be arbitrary and capricious for the Board to impose retroactively any requirement that would require CCPR to demonstrate affirmatively that specific expenses were attributable "to repairs required by RVI's ownership versus those caused by prior owners" in order to be eligible to recover overhead from the escrow account. Because the line was operational when RVI assumed ownership, and because the prior Decisions made it clear that repairs required to restore the line to an operational status would qualify for expenditure from the escrow account, it would be an injustice to shift the burden retroactively so that RVI would avoid bearing the burden of demonstrating that a particular repair was not related to its failure to keep the line operational.

Of course, had RVI not interfered with the escrow, the first \$375,000 of repairs would have been funded out of the escrow, and not with State or Federal funds. For example, the \$752,221 that was spent on new signals to replace those that RVI allowed to disintegrate would have wiped out the entire escrow account.

In this regard, the Board's attention is invited to the highly relevant evidence of record submitted by Walter J. Gane and Timothy Robbins that conclusively demonstrates that CCPR is entitled to claim administrative overhead with respect to the signals that RIV allowed to disintegrate when it disconnected them, as well as the capital cost of replacing the signals. The reasoning expressed in the *November 2001 Decision* makes it clear that the cost of replacing signals was to be assessed against RVI due to its lack of due diligence in maintaining the signals when it owned the line.¹⁶

¹⁶ *November 2001 Decision* at 6-7.

As Gane explained in his January 21, 2003 Verified Statement:

Shortly after the sales transaction was consummated, I personally inspected each of the signal crossing devices on the line. I was accompanied by Dan Stout, an inspector for the Federal Railroad Administration ("FRA"). The FRA has established a program in which its inspectors, including Mr. Stout, are encouraged to "adopt" a short line railroad in order to assist it in bringing its line and operations into compliance with FRA standards. Mr. Stout has adopted CCPR. During the tour, we identified the various signal crossing devices that had to be repaired and replaced.

As it turned out, it was not possible to simply turn on the power in order to reactivate the signals. Because of the length of time that had elapsed between the time that RVI had turned off the power and the date of our inspection, we discovered that the signals had been irreparably damaged. As a result of not being maintained, the batteries in the switches had become corroded and broken. The same was true of the relays. In many instances, birds and other animals had built nests in the meter boxes. Others had been vandalized. In the final analysis, not one of the devices was in a workable condition.

Due to the deteriorated condition of the devices, the power company refused to allow us to reconnect the old signals. Instead, we were required to install new poles, meter boxes, conduit, breaker boxes and weatherheads. Only then could the signals pass post-repair inspections and be reactivated.

Although I originally estimated that it would cost between \$15,000 and \$20,000 to reconnect the existing signal equipment, the deteriorated condition of the connections caused my estimate to be too low.

It is my understanding that escrowed funds were used to pay the basic costs of repairing the signals so that operations could be reinstated. We could not reconnect the signals and begin rail operations without first successfully passing a full inspection and all required tests. *See* 49 CFR § 234/247(b).

In his original Verified Statement, dated January 20, 2003, Timothy Robbins specifically testified as follows (V.S. Timothy K. Robbins at para 8):

When we finally took possession of the line in late January 2001, we discovered that RVI had allowed the line to deteriorate further than we had anticipated. This is most easily demonstrated by reference to the restoration of signaling equipment, which is specifically covered by all of the Board's Decisions related to the

use of escrowed funds. As the Board is aware, signaling equipment is subject to FRA regulations published at 49 CFR Part 234. In particular, § 234.247(b) imposes the requirement that when an grade crossing warning signal is temporarily taken out of service, it must be fully inspected and “all required tests must be successfully completed before railroad operations over the grade crossing resume.” In addition, § 234.247(c) states that any “electronic device, relay, or other electromagnetic device that fails to meet the requirements of tests required by this part shall be removed from service and shall not be restored to service until its operating characteristics are in accordance with the limits within which such device or relay is designed to operate.” As Mr. Gane will describe in detail, because RVI had turned off the power to the signaling equipment for several months, if not years, it was necessary to overhaul all of the signaling equipment. In the final analysis, more than \$750,000 was spent on signals. That alone was more than the entire amount placed in escrow at the outset of the project. However, the FRA left us no choice but to make all needed repairs to that vital component of railroad safety. **The \$752,221 figure does not include any amount for installation of new signal systems that did not previously exist, such as the grade crossing warning signals that were installed at Western Reserve Road in Boardman Township.** In any event, no amount was drawn down from the escrow to pay the invoices submitted by GE Transportation Systems Global Signaling, LLC. (Emphasis added).

Given the Board’s explicit recognition that the capital cost of replacing signals could be charged against the escrow account, it necessarily follows that overhead expenses associated with the necessary replacement of signals is directly attributed to RVI’s failure to keep the line operational and to protect essential equipment during RVI’s ownership of the line. Consistent with normal railroad practices, a 6% overhead figure for work that is done by a third-party would be reasonable. As such, CCPA/CCPR is entitled to recover administrative overhead of \$45,133.26 related to the signals from the escrow.

The same is true of every other project that was paid for with Federal and State funds. Without question, the invoices totaling \$149,872.69 submitted to the Ohio Rail Development Commission by CCPA on October 1, 2001 and November 8, 2001, leave no doubt that the

repairs covered by those invoices were associated with rehabilitation of the line of railroad essential to restoration of service.¹⁷ Had RVI had not interfered with the disbursements from the escrow account, the \$149,872.69 would have qualified for payment from the escrow. In addition, as Lou Jannazo, Chief of Planning has testified:

Because it was impossible to draw down funds from the escrow account to pay for repairs that should have been paid out of the escrow account, ORDC instead funded several of those repairs. During the period between January 24, 2001 and November 9, 2001, ORDC spent \$177,210.38 on various crossing surface repairs and signal upgrades on the CCPA line. In addition, ORDC spent \$66,531.95 on various track repairs during this period. On November 28, 2001, ORDC spent \$83,340.74 to pay for additional track repairs for which CCPA invoiced ORDC before November 9, 2001.¹⁸

The foregoing further demonstrates the impact of RVI's actions to thwart the orderly disbursement of funds from the escrow account. Plainly, the \$327,083.07 identified by Jannazo should have come out of the escrow account.

In order to make full and judicious use of the State and Federal grants while it waited for the Board and the Court of Appeals to resolve the escrow account issues, CCPR did not assign any overhead to the repair projects that were funded by ORDC. Because the ORDC funds were used only to repair the line and replace the signals that RVI allowed to deteriorate, the use of escrowed funds to cover overhead is legitimate in the absence of any proof, *of which there is none*, that the ORDC funds were used for projects that were not the result of RVI's failure to maintain and keep the line operational during its ownership of the line. RVI has not identified any such repair project. Thus, there is not a scintilla of evidence that State and Federal funds were used to repair any damage or deterioration for which RVI was not responsible pursuant to

¹⁷ See V.S. Drake, Attachment B, filed January 3, 2005. A review of these invoices, which cover items such as rail, spikes, crossties, tie plates, and the certified documentation regarding time sheets and labor attached thereto leaves no doubt that they should have been paid with escrowed funds, and not by ORDC and the taxpayers of Ohio.

¹⁸ V.S. Jannazo, at ¶6.

the Board's *November 2001 Decision*. Because RVI has failed to show that any amount was spent on a non-qualifying repair, there is no justification for disallowing payment of CCPR's administrative overhead related to the repairs that were made and paid for with grant money.

Had RVI not interfered with the escrow, the expenses for the initial repairs, including overhead, would have been paid by the escrow and there would have been no need for CCPR to seek payment of its administrative overhead from the escrow account. Given the Board's recognition that money from the fund may be used for legitimate overhead expenses, there is no basis to exclude payment from the fund of legitimate administrative overhead expenses for repairs that were paid by the Federal and State grants. If payment of administrative overhead for Federal and State funded repairs is denied, RVI would be unjustly enriched and rewarded for its intransigent behavior which disrupted the orderly disbursement of funds from the escrow account.

III. RVI's Construction Of The Fraud Exception Is Baseless.

According to RVI, CCPA/CCPR's may not rely on the literal wording of the Board's *November 2001 Decision* because if the fraud exception was the only basis for challenging expenditures from the escrow account, the fraud exception "would simply abrogate the other requirements established by the Board and render compliance with those requirements unnecessary."¹⁹ RVI also claims that Board counsel disclaimed the "fraud only standard" before the U.S. Court of Appeals for the Sixth Circuit.²⁰ These contentions are untenable.

In the first place, Board counsel did not, and indeed could not, disclaim the explicit "fraud only standard" during the course of judicial review. As has long been recognized, "the courts may not accept appellate counsel's post hac rationalizations for agency action; ... an agency's ... order [can only] be upheld, if at all, on the same basis articulated in the order by the

¹⁹ RVI Reply at p. 13.

²⁰ *Id.* at 14, 22.

agency itself.”²¹

RVI has mischaracterized counsel’s argument. Counsel’s principal argument was that RVI’s challenge before the Court was not ripe for review. In addition, as counsel implicitly acknowledged, the fraud requirement and the other requirements in the Board’s *November 2001 Decision* are easily reconciled when a showing of fraud is treated as a condition precedent. In other words, for RVI to challenge a specific repair, RVI must *first* show with particularity that payment from the escrow account for that repair was made with knowledge that the repair had nothing to do with RVI’s failure to keep the line operational, and, therefore, was not its responsibility.²² Any other interpretation would do violence to the Board’s explicit wording at page 9 and Ordering Paragraph 8 of the *November 2001 Decision*.

RVI also says that fraud is revealed because Michael A Robbins and William J. Robbins allegedly submitted “all of their 2001 overhead costs to CCPA for payment from the escrow account [with knowledge that] they did not maintain adequate documents and records with which to allocate their 2001 overhead costs to repair projects attributable to RVI’s period of ownership.”²³ That is not true. Timothy Robbins’ original allocation openly reveals that he allocated only a percentage of the expenses attributable to Michael and William J. Robbins, Jr. to the CCPR projects.

In addition, the Verified Statements in Support of Reopening and Reconsideration

²¹ *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

²² As RVI has also noted, it may also show that “the claimed expenditure of funds did not occur” or that payment was for a phantom project. RVI Reply at p. 13. There is no suggestion that either CCPR or CCPA is guilty of any such activity.

²³ RVI Reply at p. 19. RVI’s fixation with the absence of time cards for corporate executives reveals the ultimate weakness of its position. It is respectfully submitted that the absence of detailed time records does not prevent CCPR from making legitimate allocations of time spent by its officers, especially when they can show that they were physically “on site” in Ohio and working on the project. Also, as CCPR’s General Ledger Detail Report reflects, its corporate records fully account for legal fees, even if such fees were not included in the amount submitted to CCPA for payment.

submitted by William K. Robbins, Jr., Michael Robbins and Timothy K. Robbins, along with the General Ledger Detail Report and accompanying invoices and proof of payment, have corroborated Timothy Robbins' original calculations that were used to determine administrative overhead.²⁴ Even if those individuals, in keeping with their ordinary course of business, did not keep time sheets on which they recorded their efforts to deal with the repair projects attributable to RVI's period of ownership, that does not support RVI's desperate attempt to try belatedly to frame an argument that anyone associated with and/or employed by CCPR engaged in any fraudulent activity.²⁵

In addition to the original administrative overhead figures, Timothy Robbins has also introduced evidence of legal fees (which are classified as a general operating expense) that are related to the escrow account and the Pennsylvania PUC proceeding arising out of RVI's unlawful failure to maintain its crossings in Pennsylvania. As RVI has candidly conceded when it chastises the Robbins and CCPR for failing to account of all of administrative costs in their initial evidentiary submission, legal fees are properly considered to be "administrative costs."²⁶

In summary, CCPA/CCPR jointly submit that adequate documentation exists to support the full amount of administrative overhead expenses for 2001 and that there is no longer any legitimate basis to preclude the escrow fund from being used for projects paid for with Federal and State grants, especially when those grants were only used because it was impossible to draw

²⁴ RVI says that administrative overhead should be disallowed "because CCPR provided no support of the percentages of time which its employees attributed to repair work on the Y&S line related to RVI's period of ownership." V.S. Wehner at 4. The reference to "the Y&S line" is disingenuous at best. At all relevant times, the line belonged to RVI, which took no steps whatsoever to maintain the line in order to be able to satisfy the common carrier obligation that it assumed when it acquired the line of railroad. Instead, as the Board has previously recognized, RVI failed to take any steps to maintain the line so as to be able to conduct rail operations. That is the law of the case.

²⁵ Even if the Board were to conclude that CCPR's records were as "slip shod and unprofessional" as Wehner has charged, sloppiness is not the equivalent of fraud. Of course, Wehner's less than accurate portrayal of CCPR's recordkeeping has left him with precious little room to engage in name calling.

²⁶ RVI Reply at p. 19.

down funds from the escrow fund in a timely fashion. Any other result serves only to unjustly enrich RVI, which clearly lacks the clean hands necessary for it to invoke principles of equity.

IV. The NS Underpass Was Made Inoperable By RVI's Action In Allowing An Adjoining Landowner And The City To Move An Intermittent Stream And A City Water Overflow Runoff Ditch From Their Property And Direct The Water Flow Onto The Railroad.

RVI continues to say that the long term conditions at the NS underpass would take the repairs out of the category of damages caused by RVI. Even if it is true that the underpass had been a recurring problem for a number of years, there is no suggestion in this record that it created a situation where the line was inoperable. Instead, what CCPR has demonstrated is that RVI, either actively or passively, allowed the City and the neighboring industry to intensify the problem, which then required CCPR to undertake additional repairs that would not otherwise have been required. As Timothy Robbins explained at ¶ 11 of his Verified Statement dated January 3, 2005

The fact that the rail line is built in a depression had little or nothing to do with the repairs that were made. CCPR's repairs addressed the excessive runoff that are solely attributed to RVI's decision to allow the City and the adjoining industry to take actions that intensified the drainage problem. Prior to RVI allowing the drainage system to be modified, drainage in that area was likely an ongoing problem. However, the problem was made much worse when RVI allowed a neighboring industry, which is located to the west of the track, to move an intermittent stream and a city water overflow runoff ditch from their property and direct the water flow onto the railroad. Had it not been for RVI's action in allowing this modification, the drainage problem would not have been more than an occasional nuisance. As a result, RVI's actions compelled CCPR to take further remedial action.

Plainly, the cost of these repairs fit well within the bounds of the Board's directive in its *November 2001 Decision*. Under the law of the case, the cost of repairs caused by RVI's action in allowing the City and the adjoining industry to intensify the drainage problem should be assessed against the escrow account.

V. There Is No Rational Basis For Disallowing Recovery From The Escrow For The Cost Of Needed Repairs To The Old Route 51 and Cannellton Road Crossings.

Although CCPR, through its attorneys, will apologize to the Board for the confusion that was created by the written bids that were submitted by its affiliates to confirm their prior oral estimates, it adheres to the arguments presented in the Joint Petition for Reopening and Reconsideration. Because competitive bids were obtained from corporate affiliates before it awarded the project to Ohio Trak, which was the low bidder, CCPR satisfied any assumed requirement regarding competitive bidding. In any event, RVI cannot demonstrate that it suffered any harm from Ohio Trak being awarded the bid.

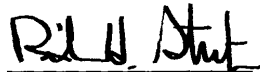
In addition, CCPR contends that the language “keep account of ...evidence of competitive bids is not the equivalent of an explicit order that “CCPA shall require CCPR to obtain competitive bids.” Therefore, even if competitive bids had not been obtained from the corporate affiliates, CCPA would not have violated the explicit terms and conditions imposed by the Board in Ordering Paragraphs 6 and 8, which do not mention competitive bids. Given the absence of any harm to RVI, which unquestionably was responsible for the need to remove the pavement and repair the two crossing, there is no rational basis for unjustly rewarding RVI by requiring repayment of funds that were legitimately expended to make the needed repairs at those two crossings.

Conclusion


As CCPA/CCPR have demonstrated, RVI's position is seriously deficient with respect to both the law and to the facts surrounding this controversy. Hence, the Board should exercise its well-settled discretion and allow the filing of this reply. Moreover, the Board, after due consideration of the arguments raised by CCPA/CCPR in their Joint Petition for Reopening and Reconsideration and all the evidence submitted therewith, should summarily reverse its

December 2004 Decision and terminate this proceeding. First, had RVI not interfered with the orderly functioning of the escrow account, this proceeding would not have been required. Second, there is no evidence of fraud. Third, the expenses that were covered by the escrow funds were legitimate expenses that were all related to repairs to RVI's line that were the result of RVI's failure to keep the line operational during its ownership of the line. Fourth, any other result would result in unjust enrichment to RVI which, from the moment it acquired the line, consciously disregarded its statutory common-carrier obligation and allowed the line to deteriorate, either through authorizing the modifications to the right-of-way or through a simple lack of due diligence. As the Board explicitly recognized in its *November 2001 Decision*, "we hold RVI responsible." Unfortunately, the *December 2004 Decision* had just the opposite result.

Respectfully submitted,



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Central Columbiana & Pennsylvania Railway, Inc.

Date: March 15, 2005

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB-556 (Sub No. 2X)

RAILROAD VENTURES, INC.-ABANDONMENT EXEMPTION
BETWEEN YOUNGSTOWN, OHIO AND DARLINGTON, PA
IN MAHONING AND COLUMBIANA COUNTIES, OHIO
AND BEAVER COUNTY, PA

VERIFIED STATEMENT OF WINFRED L. ROSE, CPA

1. My name is Winfred L. Rose. I am a Certified Public Accountant licensed in the State of Arkansas. I have been in public practice since December 1972. Prior to 1972, I served 5 ½ years as an auditor and revenue agent with the Internal Revenue Service in Arkansas. I have performed various services for Arkansas Short Lines, Inc. and its multiple affiliates, including Central Columbiana and Pennsylvania Railway, Inc. Such services include management advisory services, assistance to bookkeeping staff with the company's internal financial statements, and assistance to the company's independent auditors in their preparation and issuance of year-end audited financial statements.

2. I have been asked to review and correct certain statements and comments included in the Verified Statement of George D. Wehner, ASA ("V.S. Wehner") previously submitted to the Surface Transportation Board on or about February 24, 2005.

3. Wehner says that on page 14 of the LDR there is an entry for "Danny Robbins personal Visa in the amount of \$10,000." The actual entry is only \$252.00. Wehner says that on pages 15 and 16 of the LDR "there are entries to Delta Dental of

over \$13,000.” The eight (8) entries on those pages for Delta Dental insurance total only \$768.54.

4. Wehner also says that there is an entry on page 14 of the LDR for “Ricky Vaughn meal expense \$400.” The entry reflects 16 days of \$25 per diem for meals. Wehner also says that there is an entry on page 28 of the LDR for “meal expenses charged to Visa card totaling \$5,544.” This entry covers nine (9) months of meals between January and October 2001 when the track was being rehabilitated in order to begin rail service. The original submission to the Board only included \$4,903 for the period from 3/01/2001 through 12/31/2001.

5. Wehner says on page 30 of the LDR that “there is telephone expenses of \$8,431, a portion of which was paid to SunCom a southeastern wireless telephone company.” This figure covers ten months of phone service for both land lines and cell phones. There is nothing to suggest that the telephone charges were excessive. These charges were not included in the original submission to the Board for administrative overhead.

6. Wehner also says that on page 32 of the LDR “there are \$8,885 in rents to Columbia Manor Apartments and Rent Way.” Actually, the total rent for nine months was only \$7,934.18 (Wehner failed to note the credit that was given for one month’s rent). The figures on page 32 of the LDR did not include the entire year’s expenses, which actually totaled \$9,837 as previously reported to the Board.

7. I will also address certain of the comments that appear at page 9 of Wehner’s Verified Statement. In reference to his review of the company’s general ledger detail report for the periods 1 through 10 ending 10/31/01, Wehner states in the first

paragraph at Line (1) that “115 ledger entries to correct posting errors on 34 pages, as many as 16 corrections on the same page.” I assume that this statement is intended to support his conclusion in the last sentence of the paragraph regarding the company’s alleged inadequate accounting procedures and sloppy bookkeeping. That conclusion is not justified. In my 32 years of public practice, I have never seen a set of books that did not contain corrections of posting errors. If you assume that his count is correct, there is an average of 11.5 correcting entries per month, which is no indication of anything, except the effort of the bookkeeping staff and management to record transactions properly.

8. During the period of time between 2001 and 2002, the company had substantial rehabilitation work in progress funded from many sources, not just the Escrow Account, and many invoices were received from vendors for materials and work performed with inadequate explanation necessary for a proper book entry. Each month, management would review the invoices and any subsequent reimbursements for proper classification on the books. If changes were required, a correcting book entry was made to insure the accuracy of the books. This is a normal process under the circumstances and should be a clear indication of management’s effort to maintain accurate records. Most importantly, during this period the company’s accounting procedures and records were included as part of the consolidated financial statements audited by Hoffman & Brobst, PLLP, Certified Public Accountants. Hoffman & Brobst issued an “unqualified opinion” (sometimes referred to as a “clean opinion”) to the consolidated companies. I submit to the Board that the issuance of an “unqualified opinion” by the independent

auditors would not have been possible if the companies records were the result of inadequate accounting procedures and sloppy bookkeeping.

9. Wehner's speculative comments regarding bank fees are unfounded.


Disregarding speculation, during this period there were numerous bank fees because the company maintained four bank accounts and each bank account was assessed a regular and continuing service charge of \$10 per month. Such service charges had nothing to do with assessments for "NSF" fees.

10. Wehner's suggestion that checks were written before deposits were made is also wide of the mark. I have consulted with company's accountant regarding the company's check issuance policy and the timing of any required deposits necessary to "cover" the disbursements, now and in 2001. As I was informed, the policy has not changed. Because the parent company maintains multiple bank accounts in different banks because of the diverse locations of the affiliates, it is not unusual for the company to generate checks before funds are transferred to the particular account on which the check is drawn. However, it is the company's policy to "hold" and not release the checks until the transfers have been accomplished. In addition, the computer generation of a check will be recorded in the in general ledger at date of generation; however, that general ledger date is not an indication of when the check was mailed or released and should not be construed an "NSF check." I have found no evidence to support Mr. Wehner's statement that there were "ledger entries indicating that checks were written before deposits were made to make the checks good." Once again, the company's independent auditors would have been very concerned about these types of transactions – had they existed.

FURTHER SAYETH THE AFFIANT NOT.

I, Winfred L. Rose, declare under penalty of perjury that the foregoing is true and correct.

Executed on March 15, 2005.

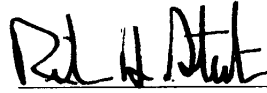


Winfred L. Rose, C.P.A.

CERTIFICATE OF SERVICE

I, Richard H. Streeter, hereby certify that the foregoing Joint Motion For Leave To File A Reply To Clarify The Record, Or, In The Alternative, Joint Motion To Strike, was served March 15, 2005, via first mail, postage prepaid, on the following:

John A. Vuono, Esq.
Richard Wilson, Esq.
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, Pennsylvania 15219-2383

A handwritten signature in black ink, appearing to read "Richard H. Streeter", written over a horizontal line.

Richard H. Streeter